IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 391

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED,
Respondent.

BRIEF FOR RESPONDENT.

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OPINIONS BELOW.

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The petition for certiorari was filed September 28, 1938, and certiorari was granted on November 7, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, under Section 302 of the Revenue Act of 1924, the survivor's half interest in joint tenancy real estate acquired prior to the enactment of the Revenue Act of 1916, may be included in the gross estate of the decedent, the other joint tenant, who furnished the purchase price therefor.

STATEMENT.

The statement of the case set forth in the Petitioner's Brief is correct but too voluminous.

By deed dated July 29, 1909 and filed for record August 6, 1909, Lena De St. George conveyed and warranted to "W. Francis Jacobs and Elizabeth C. Jacobs, husband and wife, as joint tenants and not as tenants in common" the real estate in Illinois here in question (R. 64, 65). On June 17, 1924, W. Francis Jacobs, hereinafter referred to as Dr. Jacobs, predeceased his wife, Elizabeth C. Jacobs (R. 71). Under the provisions of Section 302 of the Revenue Act of 1924, the Commissioner included in the gross estate of Dr. Jacobs, subject to Federal estate tax, the one-half interest in this property which Dr. Jacobs acquired in 1909 and which passed upon his death to Mrs. Jacobs by reason of survivorship, and the Respondent makes no objection thereto. Under the provisions of Section 302 of the Revenue Act of 1924, the Commissioner included in the gross estate of Dr. Jacobs, subject to Federal estate tax, the one-half interest in this property which Mrs. Jacobs

acquired in 1909, (R. 51) and the District Court (R. 75) and the Circuit Court of Appeals (R. 87) have held that the inclusion in Dr. Jacobs' estate for Federal estate tax purposes of Mrs. Jacobs' one-half interest in this property was improper, and the Respondent in this proceeding urges that the decisions of the Courts below be sustained.

The tax here in controversy is $142.50, *i. e.*, 2% of $9500. (½ of the value (R. 51) of the Humboldt Boulevard property here in question) diminished by 25% thereof (credit for inheritance tax paid).

In the first line of the first full paragraph on page 4 of Petitioner's Brief, the word "Petitioner" should read "Respondent."

Summary of Argument.

The courts below correctly held that Mrs. Jacobs acquired title and control of one-half of the joint tenancy real estate here in question in 1909 and that in her half, Dr. Jacobs had no title or control.

The courts below correctly held that the nature and character of the title to the real estate acquired by Dr. Jacobs and Mrs. Jacobs respectively by reason of the conveyance to them in joint tenancy in 1909 is not similar to the nature and character of the title to real estate acquired by tenants by the entirety.

The petitioner erroneously asserts "that there is no distinction so far as taxability is concerned between estates held by the entirety and those held in joint tenancy."

The courts below correctly held that the one-half interest in the jointly owned real estate, the title to which Mrs. Jacobs acquired in 1909, prior to the enactment of any Federal estate tax law, was not subject to tax upon the death of Dr. Jacobs in 1924 because such tax could only be imposed by giving an invalid retroactive construction to the Revenue Act of 1924.

ARGUMENT.

I.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That Mrs. Jacobs Acquired Title and Control of One-Half of the Joint Tenacy Real Estate Here in Question in 1909 and That in Her Half Dr. Jacobs Had no Title or Control.

The Respondent agrees with the Petitioner that the deed of the premises here in question from Lena De St. George to Dr. and Mrs. Jacobs conformed to the provisions of the Revised Statutes of Illinois with reference to the creation of joint tenancies in real estate with the right of survivorship and that by this deed a joint tenancy with right of survivorship was created in the real estate here in question in 1909.

The material part of the Revised Statutes of Illinois providing for the creation of joint tenancies in real estate with right of survivorship which is referred to at page 16 of Petitioner's Brief and is set forth at page 22 of Petitioner's Brief, has been in effect in Illinois since 1827.

Mette v. *Feltgen*, 148 Ill. 357.

The Petitioner erroneously disregards the fact found by the court below (R. 90, 91) that under the Illinois law, Mrs. Jacobs acquired title to the one-half of the joint tenancy real estate the taxability of which is here in question, upon the delivery of the deed thereto in 1909.

A. Under the Laws of Illinois, Mrs. Jacobs Acquired Full Title, Control and Enjoyment of the One-half of the Joint Tenancy Real Estate Here in Question Upon the Creation of the Joint Tenancy in 1909, and Such Would Have Been the Result Under the Common Law.

In Illinois, as at common law, one joint tenant has the right to convey his half interest in the property during the lifetime of the other joint tenant without the concurrence of the other joint tenant.

Lawler v. *Byrne*, 252 Ill. 194, 196.
Szymczak v. *Szymczak*, 306 Ill. 541.
Washburn, Real Property, 5th Edition, page 675.

In Illinois, as at common law, one joint tenant, during the lifetime of the other joint tenant, may mortgage his half interest in joint tenancy real estate, or subject it to a lien.

Hardin v. *Wolf*, 318 Ill. 48.
Leise v. *Hentze*, 326 Ill. 633.
Kent's Commentaries, 7th Edition, Volume IV, page 379.

In Illinois, as at common law, one joint tenant may sue for partition during the lifetime of the other joint tenant without the concurrence of the other joint tenant.

Ill. Rev. Stat. 1937, Chap. 106, Sec. 1.
Barr v. *Barr*, 273 Ill. 621.
Kent's Commentaries, 7th Edition, Volume IV, page 379.
Washburn, Real Property, 5th Edition, page 682.

In Illinois, as at common law, each joint tenant is entitled to one-half of the rents and profits from the joint tenancy property.

Barr v. *Barr*, 273 Ill. 621.
Washburn, Real Property, 5th Edition, page 675.

In Illinois, as at common law, the half interest of each joint tenant is chargeable with his individual debts and is subject to levy and sale upon an execution against him.

Spikings v. *Ellis,* 290 Ill. App. 585.

Kent's Commentaries, 7th Edition, Volume IV, page 376.

B. This Court Has Held That One Joint Tenant Has No Title or Control in the Half Interest of his Co-Tenant.

This court, in the case of *Knox* v. *McElligott,* 258 U. S. 546, clearly recognized the principle that each of two joint tenants acquires full title, control and enjoyment of one-half of the joint tenancy property upon the creation of the joint tenancy, in quoting the following from the opinion of the District Court (at page 548):

> "At the time the statute was passed, Cornelia Kissam's interest belonged to her. * * * From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

In his brief the Petitioner sees fit to disregard the finding of the court below (R. 91), that in 1909 Mrs. Jacobs acquired title to the one-half of the joint tenancy real estate here in question and that her interest was a vested property right. This finding of the court was correct, it is fully supported by the authorities cited above, and should be sustained.

II.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That the Nature and Character of the Title to the Real Estate Acquired by Dr. Jacobs and Mrs. Jacobs Respectively by Reason of This Conveyance to Them in Joint Tenancy Is Not Similar to the Nature and Character of the Title to Real Estate Acquired by Tenants by the Entirety.

The court below found (R. 90):

> "Illinois does not know estates by the entirety. In such estates the title of each grantee is to the whole and no act of the one can destroy or affect the right of survivorship in the other. When the one dies, he merely ceases to divide the enjoyment of the estate of which he was completely seized by virtue of the creative instrument. On the other hand the title of each joint tenant is to a share of the estate only. If one dies, the survivor becomes seized of the whole. But the creative instrument gives him title to only his share and the share which he receives as a result of the death of his co-tenant is a new one. Co-tenants possess the incidents of enjoyment such as sale, mortgage, lease, and partition."

This finding is amply supported by the authorities.

The incidents of joint tenancies and tenancies by the entirety in real estate have been known since feudal days and the differences between them have been commented on by legal writers and by the courts innumerable times.

In a joint tenancy with two joint tenants, each one, at the inception of the joint tenancy, acquires an undivided one-half interest in the property. From this follows the various attributes of joint tenancies enumerated above, none of which are applicable to tenancies by the entirety.

In tenancies by the entirety, which can only be created between husband and wife, in the eyes of the law there

is but a single ownership, the husband and wife being considered as a single entity, neither one of the tenants by the entirety owns a share of the property or can sever the tenancy during the lifetime of both and on the death of the husband, the wife for the first time becomes entitled to control the property or any part of it as her own.

In Kent's Commentaries, 7th edition, Volume IV, page 375, the author states with reference to joint tenants:

> "They have each (if there be two of them for instance) an undivided moiety of the whole. * * * For the purposes of alienation, and to forfeit, and to lose by default in a *praecipe* he, (a joint tenant) is seized only of his undivided part or proportion."

In Holdsworth, A History of English Law, (1909 ed.) Vol. III, page 108, the author states:

> "Tenancy by entireties can only exist where an estate is given to husband and wife. During their marriage husband and wife are one person in law; and an estate so given must come to the wife (unless it has been conveyed away by fine), notwithstanding any alienation or forfeiture incurred by the husband."

In Preston, Elementary Treatise on Estates, in speaking of tenancies by the entirety, the author states at page 131:

> "The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage they have the estate entirely as one individual, and on the death of one of them, the entire tenement will, for all the estate of which they are seised in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone, to prejudice the right of the other."

In Tiffany on Real Property, 2d Edition, Vol. I, page 645, the author states:

> "The most important incident of tenancy by entireties is that the survivor of the marriage, whether the husband or the wife, is entitled to the whole, which

right cannot be defeated by a conveyance by the other to a stranger, as in the case of a joint tenancy, nor by a sale under execution against such other."

And at page 655:

"There can be no partition of land held by the entirety, since this would imply a separate interest in each tenant, contrary to the underlying theory of the tenancy."

In Washburn, Law of Real Property, 5th Edition, the author states at page 343:

"In consequence of the theoretic unity and entirety of the ownership of husband and wife in respect to their interest in lands, they cannot take by purchase in moieties; * * * They are not properly joint tenants of such such lands, since, though there is a right of survivorship, neither can convey so as to defeat this right in the other. Each takes an entirety of the estate."

In discussing joint tenancies, the author states at page 675:

"But for purposes of alienation, each has only his own share. And the shares of several joint-tenants, as well as of tenants in common, are always presumed to be equal."

In Kent's Commentaries, 7th Edition, Volume 4, the author, after a discussion of early statutes abolishing joint tenancies, states, at page 378:

"The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate, so held by the husband and wife, affected by the statutes of partition."

Estates by the entirety have not been possible in Illinois at any time since the enactment of the "Married Woman's Law" in 1861.

Cooper v. *Cooper*, 76 Ill. 57.
Mittel v. *Karl*, 133 Ill. 65.
Lawler v. *Byrne*, 252 Ill. 194.

The Petitioner to the contrary notwithstanding, the finding of the Court below (R. 90) that the nature and character of the title to the real estate acquired by Dr. Jacobs and Mrs. Jacobs respectively by reason of the conveyance to them in joint tenancy of the real estate in question is not similar to the nature and character of the title of real estate acquired by tenants by the entirety, was correct and is fully supported by the authorities cited above and should be sustained.

III.

The Petitioner Erroneously Asserts "That There Is No Distinction So Far as Taxability Is Concerned Between Estates Held by the Entirety and Those Held in Joint Tenancy."

The statement quoted above, appearing on page 9 of Petitioner's brief, erroneously states the law. There is a great distinction so far as taxability is concerned between joint tenancies and tenancies by the entirety as this Court, other courts and the Commissioner have recognized.

This distinction is apparent from a comparison of the different treatment of the two tenancies, in cases arising under Revenue Acts in force prior to 1924 and from an examination of the basis of this Court's holdings with respect to the tenancy by the entirety cases.

This Court has decided that under the Revenue Acts in force prior to the Revenue Act of 1924, in the value of the

gross estate of a decedent for Federal estate tax purposes, there can be included only one-half of the value of real estate held as joint tenants by the decedent and another person, if the joint tenancy was created prior to 1916, even though the decedent furnished all of the purchase price therefor.

In the case of *Knox* v. *McElligott*, 258 U. S. 546, it appeared that Jonas B. Kissam and Cornelia B. Kissam, his wife, in 1912, acquired bonds and mortgages as joint tenants which had been theretofore owned by Mr. Kissam. Mr. Kissam died in 1917 and estate tax was assessed upon the entire value of the jointly owned property. Upon a suit to recover that portion of the tax which was based upon the half interest in the joint tenancy property which Mrs. Kissam acquired when the joint tenancy was created, the District Court found in favor of the taxpayer, the Circuit Court of Appeals for the Second Circuit reversed, but this Court reversed the Circuit Court and held that as the decedent had neither title nor control of his wife's one-half of the joint tenancy propery, it was not proper to include her one-half interest in his estate for Federal estate tax purposes.

In the case of *Cahn* v. *United States*, 297 U. S. 691, it appeared that the Court of Claims had determined that the entire value of joint tenancy property acquired by the decedent and his wife in 1909 should be taxed in the estate of the decedent who died in 1921, his wife having survived him. This Court reversed the Court of Claims in a *per curiam* decision in which the *Knox* case was cited; the rule announced in the *Knox* case must therefore still prevail.

As noted above, in the *Knox* and *Cahn* cases, this Court announced the rule that under the Revenue Acts in force prior to the Revenue Act of 1924, there can be included in the value of the gross estate of the decedent for Federal

estate tax purposes, only one-half of the value of the joint tenancy real estate held by the decedent and another person if the joint tenancy was created prior to 1916 and even though the decedent furnished all of the purchase price therefor. The rule in the *Knox* and *Cahn* cases should be contrasted with the rule as to the taxability, under the Revenue Acts in force prior to the Revenue Act of 1924, of tenancies by the entirety created prior to 1916, announced in the case of *Goodenough* v. *Commissioner*, 83 F. (2d) 389 (C. C. A. 6th), in which the Court held that under the Revenue Act of 1921, tax was properly imposed upon the entire value of property held by the decedent and his wife as tenants by the entirety, the tenancy having been created prior to 1916 and the decedent having furnished all of the purchase price therefor.

The Respondent submits that the decisions of this Court in the tenancy by the entirety cases which have arisen under the Revenue Act of 1924 and the Revenue Acts prior and subsequent thereto have indicated a basis for taxation of the entire value of the property held by the decedent as a tenant by the entirety which is not applicable and does not justify the taxation under the Revenue Act of 1924 of more than one-half of the value of the joint tenancy real estate held by the decedent and another person if the joint tenancy was created prior to 1916 even though the decedent furnished all of the purchase price therefor.

In the case of *Helvering* v. *Bowers*, 303 U. S. 618, the court below held that tax was improperly imposed under the Revenue Act of 1926 upon the entire value of property held by the decedent and his wife as tenants by the entirety, the tenancy having been created prior to 1916, but this Court, in a *per curiam* opinion, citing only the case of *Tyler* v. *United States*, 281 U. S. 497, held that the entire value of this tenancy by the entirety property should be included

in the estate of the decedent who had furnished the purchase price therefor.

The Respondent submits that the basis for the decision in the *Tyler* case was expressed clearly by this Court and in language not applicable to joint tenancies beginning at page 503, as follows: (1) "the wife had the right to possess and use the whole property but so, also, had her husband;"—that is, neither spouse could avoid the other's right in the whole, which is not the case in a joint tenancy. (2) "she could not dispose of the property except with her husband's concurrence;"—each joint tenant may dispose of his half interest in the property during the lifetime of both without the concurrence of the other joint tenant. (3) "her rights were hedged about at all points by the equal rights of her husband"—a joint tenant's rights in his half of the joint tenancy property are not hedged about by any rights of the other joint tenant. (4) "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment;"—the Court here is stressing the *exclusive* right, that is, the right to deal with the property or any part of it without the assent of the other. By the insertion of the word "whole" in the following clause on page 10 of the Petitioner's Brief: "upon the death of the decedent and because of it, the survivor of the joint tenancy, for the first time, became entitled to the exclusive possession, use and enjoyment of the whole property, as her own", the Petitioner seeks by paraphrase to make this statement of the Court in the *Tyler* case refer to the combined interests of both joint tenants in the whole property, when in the *Tyler* case it was meant to refer to the exclusive, independent and sole right to deal with the tenancy by the entirety property which the surviving wife only acquired upon the death of her husband. Obviously the statement of the Court in the *Tyler*

case does not refer nor is it applicable to the joint tenancy here in question because Mrs. Jacobs had the exclusive, independent and sole right to deal with that one-half the joint tenancy property from the time of the creation of the joint tenancy in 1909. The Court's meaning in the *Tyler* case, however, is clear, and is further clarified by the remainder of the sentence, which follows: (5) "she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own;"—however in a joint tenancy, each co-tenant at any time during the lifetime of both, can deal with his half of the property as the sole owner thereof. (6) "and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will." The Petitioner at page 10 of his brief in the clause, "then only, did the survivor become assured of the power of disposing of the property by will," seems to paraphrase this language in the *Tyler* case and ingeniously suggests that the Court was stressing the right to *will*, that is, to bequeath or devise the property. Obviously the reference to "her sole *will*" in the *Tyler* case is to the free volition of the wife after the death of her husband when during his lifetime she could do nothing with the tenancy by the entirety property without his concurring therein. The petitioner's use of the word "whole" in modifying the meaning of the fourth quotation, and the contracting of "by the exercise of her sole will" into "by will" may be excusable as argument but reveals an improper attempt to reach the same conclusion logically as to joint tenants as this court has reached as to tenants by the entirety by changing the middle term of the syllogism.

In the *Tyler* case, tax was imposed under Revenue

Acts prior to the Revenue Act of 1924 upon tenancies by the entirety which were created after 1916. In view of the fact that in the *Bowers* case this Court did not refer to the retroactive provision contained in Section 302(h) of the Revenue Act of 1926, and since that section of the law was not in effect at the time of the *Tyler* case, the Respondent submits that the question of the time of the creation of a tenancy by the entirety or the presence or absence of a retroactive provision in the Revenue Act involved are not material in cases involving tenancies by the entirety. This was the government's position in the *Bowers* case. The government claimed (pp. 10 and 13 of petitioner's brief in the *Bowers* case) that there was no constitutional question of retroactivity because the entire interest ceased at death and for this reason "it is clearly immaterial when the tenancy was created."

It should be particularly noted that the *Goodenough*, *Knox* and *Cahn* cases all arose under Revenue Acts prior to 1924, the *Goodenough* case involving a tenancy by the entirety created prior to 1916, the *Knox* and *Cahn* cases involving joint tenancies created prior to 1916, and the Respondent suggests that the only valid distinction which justifies the different decisions in those cases is the fundamental difference between a tenancy by the entirety involved in the *Goodenough* case, and joint tenancies involved in the *Knox* and *Cahn* cases. It is suggested that the *Goodenough*, *Tyler* and *Bowers* cases, involving tenancies by the entirety created before and after 1916 and taxable under Revenue Acts before and after 1924, were correctly decided because property held in tenancy by the entirety truly passes in its entirety to the wife upon the death of her husband, for until the death of the husband, he retains complete control, and all the other attributes of ownership in the tenancy by the entirety property.

That the rule announced in the *Tyler* case is not applicable to this case is shown further by noting that in the *Tyler* case this Court found that the husband who furnished the consideration for the property held as tenants by the entirety retained control of the property up to the moment of his death. This was similar to the right of revocation reserved by the grantor in the trust property held taxable in the cases of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; and *Saltonstall* v. *Saltonstall*, 276 U. S. 260, and similar to the right to change beneficiaries reserved by the insured in the policies of insurance held taxable in *Chase National Bank* v. *United States*, 278 U. S. 327. The Court in the *Tyler* case noted the relevancy of these cases for this reason. It is obvious that Dr. Jacobs had no interest or control over the share of the joint tenancy property acquired by his wife in 1909, which is comparable to the power of revocation and to change beneficiaries which was the basis of taxation in the *Reinecke*, *Saltonstall* and *Chase National Bank* cases.

That there should be a distinction as to the taxability of estates by the entirety and joint estates is further recognized in the Regulations relating to Federal Gift Tax (Articles 2(7), 2(8), 19(8) Regulations 79). These Regulations treat the interest that a joint tenant receives who furnishes no consideration, as a gift of one-half of the value of the property, but in dealing with tenancies by the entirety these Regulations direct that the value of the interest received by a tenant by the entirety be computed as the value of the life interest plus the value of the right of survivorship based on mortality tables. Thus the Commissioner himself recognizes "the distinction so far as taxability is concerned" between the two estates and recognizes that each joint tenant truly owns one-half of the joint tenancy property and

that the interest which the tenant by entirety owns depends upon his chances of survival and is directly related to the death of the other tenant.

The Respondent therefore submits that this Court, other courts, and the Commissioner have heretofore recognized that a distinction exists so far as taxability is concerned, between estates held by the entirety and those held in joint tenancy and the Court below correctly determined that that distinction should be given effect in this case and properly determined that the rule announced by this Court in the *Tyler* case is not applicable in this case.

From the foregoing it must appear that the distinction, so far as taxability is concerned, between estates by the entirety and joint tenancies has been clearly recognized heretofore and the Respondent urges that in this case this distinction should be given effect.

IV.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That the One-Half Interest in the Jointly Owned Real Estate, the Title to Which Mrs. Jacobs Acquired in 1909, Prior to the Enactment of Any Federal Estate Tax Law, Was Not Subject to Tax Upon the Death of Dr. Jacobs in 1924 Because Such Tax Could Only Be Imposed by Giving an Invalid Retroactive Construction to the Revenue Act of 1924.

The Respondent submits that Sections 302 (e) and (h) of the Revenue Act of 1924 should not be construed as imposing tax in the estate of a deceased joint tenant, on the value of the surviving joint tenant's interest in joint tenancy real estate acquired prior to 1916, for if so construed those Sections are in violation of the Fifth Amendment to the Constitution.

In his Tax Message to Congress of January 19, 1939, President Roosevelt, referring to the effect of the decision of this Court in *Helvering* v. *Gerhardt*, 304 U. S. 405, which makes the compensation received by employees of the Port of New York Authority taxable for the last three years, set forth many of the reasons which make the retroactive application of tax laws unjust, oppressive and contrary to the principles of the Constitution. He stated:

> "In the interest of equity and justice, therefore, immediate legislation is required to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability on these innocent employees and investors for salaries heretofore earned or on income derived from securities heretofore issued. * * * Accordingly, I recommend legislation to correct the existing inequitable situation and at the same time to make private income from all government salaries hereafter earned and from all government securities hereafter issued subject to the general income tax laws of the nation and of the several States." New York Times, January 20, 1939, page 2.

The comments of President Roosevelt are amply supported by the authorities with reference to retroactive legislation.

In *Story's Commentaries on the Constitution of the United States*, the author states, in Volume 2, 5th edition, at page 272:

> "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

The *Constitution of the State of New Hampshire*, Part First, Article 23d (Public Laws of New Hampshire, 1926, p. 8), declares:

> "Retrospective laws are highly injurious, oppressive, and unjust."

In *Kent's Commentaries on American Law,* Volume 1, Twelfth edition, edited by O. W. Holmes, Jr., the author states at page *455:

> "A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash* v. *Van Kleeck* (7 Johns. 477) and shown to be founded not only in English law, but on the principles of general jurisprudence."

See also *United States* v. *Heth,* 3 Cranch 399, 408, 413, 414; *Potter's Dwarris, Treatise on Statutes,* page 164; The Federalist, No. XLIV (Madison).

This Court has fully recognized the principles set forth above, and as to transfers fully consummated and interests in property completely vested prior to 1916, the retroactive provisions of the Revenue Act of 1924, as well as prior and subsequent Acts, have been held to be unconstitutional or have been restricted or construed as not applicable in order to prevent an invalid retroactive operation thereof. Revenue Acts which have contained retroactive provisions have been by this Court limited in their scope to transfers completed after the enactment of some Federal estate tax law comprehending such taxation.

In *Lewellyn* v. *Frick,* 268 U. S. 238, a case which cited and followed the Knox case, Mr. Justice Holmes, in speaking of the doubt as to the constitutionality of the Revenue Act of 1919 if construed as applicable to the proceeds of paid-up policies of insurance upon the life of a decedent issued in 1901 which were payable to the wife of the decedent and in which the decedent had retained no power to change the beneficiary, said at page 251:

> "Not only are such doubts avoided by construing the

> statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

In *Nichols* v. *Coolidge*, 274 U. S. 531, this Court considered the Revenue Act of 1918 which was the first estate tax law to contain an express provision for retroactivity in that it directed that there should be included in the gross estate of a decedent, the value of property which the decedent had at any time transferred in trust to take effect in possession or enjoyment at or after his death "whether such transfer or trust is made or created before or after the passage of this Act." The trust which the Commissioner asserted to be taxable was created in 1907. By this trust the decedent reserved to herself the right to the income for life, but this right to the income was assigned by the decedent to the remaindermen in 1917. The decedent died in 1921. This Court held that the Act, to the extent that it required the inclusion of this trust property in the estate of the decedent, was in violation of the Fifth Amendment because it was arbitrary, capricious, and amounted to confiscation in view of the fact that the transfer in 1907 was irrevocable and not testamentary in character. Surely the transfer in 1909 to Mrs. Jacobs of her half interest in the joint tenancy property here in question was similarly irrevocable and not testamentary in character.

In *Hassett* v. *Welch*, 303 U. S. 303, this Court held that the provisions of the joint resolution of Congress of May 3, 1931 and the Revenue Act of 1932 should be construed as "prospective in their operation" and not as imposing "a tax in respect of past irrevocable transfers with reservation of a life interest."

The inclusion for the first time in the Revenue Act of 1924 of Section 302(h), the retroactivity clause, does not resolve the constitutional doubts as to the propriety of taxing the survivor's half-interest in joint tenancy property acquired before 1916, which were noted in the *Knox* and in many other cases.

In *Bingham* v. *United States,* 296 U. S. 211, this Court held that to avoid grave doubts as to its constitutionality, the Revenue Act of 1918 should not be construed retroactively as applying to the proceeds of policies of insurance which the decedent had assigned to his wife in 1904, the decedent having retained no power to control the policies in any way after the assignment to his wife. The similarity of this *Bingham* case to the *Knox* case should be noted in that they both arose under the Revenue Act of 1918 which contained no retroactive clause, and there was involved in each case, rights and interests in property which the survivor had acquired long prior to the enactment of any Federal estate tax law.

In *Industrial Trust Company* v. *United States,* 296 U. S. 220, this Court held that Section 302(h) of the Revenue Act of 1926, which is identical with Section 302(h) of the Revenue Act of 1924, was not applicable to the proceeds of paid-up life insurance policies on the life of the decedent who died in 1930, the policies having become paid up in 1912. In discussing the provisions of Subdivision (h) the Court said at page 221, "Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable. • • • If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls." It is submitted that in this case Section 302(h) should be similarly construed to avoid a like result as to joint tenancies.

As the *Bingham* case held that the right of the survivor to the proceeds of an insurance policy which had been vested in the survivor prior to 1916, was not taxable under the Revenue Act of 1918 and was thus similar to the *Knox* case, so this *Industrial Trust Company* case which holds that the right of the survivor to the proceeds of an insurance policy which had been vested in the survivor prior to 1916, was not taxable under the Revenue Act of 1926 which contained a retroactive clause, is similar to this *Jacobs* case.

Taxation of an interest should not be countenanced when it was created before there was any knowledge available, of the susceptibility of such interest to taxation and without any control over the ultimate disposition of that interest remaining in the decedent to cease at his death. The Respondent therefore suggests that the following words of Section 302(h), *i. e.*, "before or after the enactment of this Act," should properly be limited to mean,—before or after the enactment of this Act but after September 8, 1916 as to the survivor's half in joint tenancy property. This would be merely imputing to Congress the intention of including the full value of interests held in joint tenancies so far as constitutionally possible.

If not so limited Section 302(h) must be held to be so unreasonable, arbitrary, capricious and oppressive as to be a denial of due process because it defeats the reasonable expectations of a person, who in 1909 in entire good faith and without the slightest premonition of such a consequence, made absolute disposition of property in joint tenancy which he might have refrained from making had he anticipated the enactment of this law. *Nichols* v. *Coolidge*, 274 U. S. 531; *Coolidge* v. *Long*, 282 U. S. 582; *Helvering* v. *Helmholz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.

In the case of *Milliken* v. *United States*, 283 U. S. 15, this Court held at page 24 that a retroactive tax law was not

unconstitutional if the decedent had been "well warned that it might be taxed." In the case of *Welch* v. *Henry* (decided November 21, 1938) this Court recognized that retroactive applications of Federal estate and gift tax laws were unconstitutional because "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." In the case of *Graham and Foster* v. *Goodcell*, 282 U. S. 409, this Court held at page 429, that a retroactive tax law was not unconstitutional in "the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

It should be noted that joint tenancies did not become subject to an "established policy of taxation" until 1916 and that until July 3, 1930, the Regulations did not specifically provide that any portion of joint tenancy property created prior to 1916 was subject to tax under the Revenue Act of 1924 or the Revenue Acts prior and subsequent thereto. It is therefore apparent that at no time prior to his death did Dr. Jacobs have any knowledge or means of determining that his estate would be burdened with this tax and he might well have refrained from creating this joint tenancy had be known that the half-interest therein acquired by Mrs. Jacobs in 1909 would have been subject to tax at the time of his death. It is also apparent that Section 302(h) of the Revenue Act of 1924 should not be given retroactive effect to impose tax in this case in order to prevent tax avoidance, for Dr. Jacobs when he caused the conveyance to be made in joint tenancy in 1909 can have had no motive of avoiding a tax which was for the first time imposed under the Revenue Act of 1916.

The Respondent suggests that if Section 302(e) of the

Revenue Act of 1924 is applied retroactively, as the Petitioner seeks to apply it in this case, it further violates the Fifth Amendment because it results in an arbitrary, unreasonable and capricious classification for tax purposes of property held by a decedent in joint tenancy. It should be noted that Section 302(e) provides that as to property held by a decedent as a joint tenant the entire value of the joint tenancy should be included in the decedent's estate subject to tax except (1) in cases where the survivor can show that he was the original owner of all or a part of such property and that it never was received or acquired by the survivor from the decedent for less than a fair consideration, in which event there shall be included in the estate of the decedent only such part of the value of the property as is proportionate to the consideration furnished by the decedent; and (2) in cases where the joint tenancy property has been acquired by gift, bequest, devise or inheritance, and then only to the extent of one-half the value thereof. It must be assumed that the estate tax law is proper only as a tax upon the transfer of property at death and if it be determined that the decedent has any interest whatsoever in the half-interest of the surviving joint tenant, the imposition of tax on the entire value of the joint tenancy only if the decedent furnished the entire consideration therefor, is arbitrary, unreasonable and capricious unless such a classification is justifiable to prevent tax avoidance or evasion with reference to joint tenancies created after 1916; but obviously such a classification is not justified as to joint tenancies created prior to 1916 when tax evasion or avoidance could not have been the motive for creating the joint tenancy.

The Respondent suggests that to require the inclusion in the measure of the taxable estate of a deceased joint tenant dying after 1924 of the value of the survivor's half interest acquired prior to 1916, as a gift from the decedent, which

the Petitioner urges should be done in this case, but not when the joint tenancy property is acquired otherwise, violates the general rule that the measure of a tax cannot specially include property or transactions beyond the power of the taxing authority to tax directly. As this Court said in *Frick* v. *Pennsylvania*, 268 U. S. 473, at page 494:

> "Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground in our opinion is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly and would render important constitutional limitations of no avail."

The contention of the petitioner that the questions presented in this case have been disposed of in the Government's favor by the *per curiam* decision in the case of *Foster* v. *Commissioner*, 303 U. S. 618, cannot be sustained, as the joint tenancy which was there held to be taxable was created in 1930. Obviously the question of whether the law should be given retroactive effect was not involved in the *Foster* case for Section 302(h) or its counterpart had been in each Revenue Act since 1924 and the provisions imposing tax on joint tenancy property had been included in all Revenue Acts since 1916.

That the question of giving retroactive effect to the statute was not involved in the *Foster* case is apparent from the "Memorandum for the Respondent" filed by the Government in the *Foster* case. In that it appears that the Government did not oppose *certiorari* if limited to the question of "whether the full value of property which originally belonged to the decedent or for which he furnished the entire consideration *and which subsequent to the enactment of the first estate tax act*, was conveyed to the decedent and

his wife as joint tenants may be included in the gross estate of the decedent as a measure for Federal estate tax." (Italics supplied.)

If by the citation of the case of *Gwinn* v. *Commissioner*, 287 U. S. 224 at Page 9 of his Brief, the Petitioner is contending that this Court has held that Section 302(h) should be given retroactive effect, this contention cannot be supported. In the *Gwinn* case, this Court had before it only the question as to the taxability of the decedent's half of the joint tenancy property and the Court cited Section 302(h) simply to rebut the assertion that the Act should be construed as not applying to the decedent's half-interest therein as the taxpayer had claimed that the survivor acquired his right to the decedent's half-interest in the property prior to 1916 because the joint tenancy was created prior to that date. Petitioner submits that the true basis of the decision in the *Gwinn* case was that the interest of the decedent in the one-half of the joint tenancy property in question passed at his death to the survivor. That this was the true basis of the *Gwinn* case is evident from the quotations from and reliance upon the *Tyler* case in which it was pointed out the interest of decedent which, in that case, pervaded the whole property passed at death. That this was the true basis of the *Gwinn* case is also evident from *Griswold* v. *Helvering*, 290 U. S. 56, a later case involving the Revenue Act of 1921 which did not contain the retroactive provision of the Act of 1924 in which it was held that the decedent's half-interest in joint tenancy property acquired in 1909 was likewise subject to Federal estate tax. The Respondent therefore submits that the obstacle of a retroactive application of the law referred to in the *Knox* case was not present in the *Gwinn* case as only the decedent's half-interest in the joint tenancy property was involved and that passed at his death.

The cases of *Commissioner* v. *Emery*, 62 F. (2d) 591, and *O'Shaughnessy* v. *Commissioner*, 60 F. (2d) 235, cited in Note 4 on Page 9 of the Petitioner's Brief, do not sustain his contention, as the joint tenancy properties involved in these cases were both acquired after the enactment of the first Federal estate tax law in 1916, the joint tenancy property in the *Emery* case having been acquired in 1920, the joint tenancy property in the *O'Shaughnessy* case having been acquired in 1919. The only authority which supports the Petitioner's contention is *Dimock* v. *Corwin*, which is now before this Court.

The Petitioner bases his argument that the *Foster* case is controlling herein on the erroneous assertion at Page 12 of his Brief that "in the case of a joint tenancy it also is true that the interest of the decedent pervades the whole property and ceases only at his death, which perfects the interest of the survivor in the whole estate." This is obviously wrong. In 1909 Dr. Jacobs and Mrs. Jacobs, each, acquired title to one-half of the property here in question. The only right which Dr. Jacobs had in the one-half of this property which Mrs. Jacobs acquired in 1909 and which the Petitioner asserts is subject to tax, was the right to acquire the same by survivorship if he survived Mrs. Jacobs and if the joint tenancy was not severed during the lifetime of both joint tenants by the act of either party. His right in Mrs. Jacobs' half of the property is therefore similar to a remainder contingent upon survivorship, a reverter contingent upon survivorship, and an inchoate right which never comes into existence by reason of the conditions never having been met. This Court has frequently held that the mere possibility of acquiring property by survivorship which ceased at death does not justify the inclusion of that property in the estate of the original owner for the purposes of taxation. *Helvering* v. *Helmholz*,

296 U. S. 93; *White* v. *Poor*, 296 U. S. 98; *Helvering* v. *St. Louis Union Trust Co.*, 296 U. S. 39; *Becker* v. *St. Louis Trust Company*, 296 U. S. 48.

The Respondent urges that Sections 302(e) and (h) should be construed in this case as not imposing tax upon the one-half interest in the jointly owned real estate which Mrs. Jacobs acquired in 1909 or that if so construed these Sections are invalid because they violate the Fifth Amendment.

Conclusion.

Resistance to unreasonable, arbitrary, capricious and oppressive taxation has been a powerful factor in English and American history. It precipitated the revolution in England which ultimately established the sovereignty of Parliament and it was the vital issue which led to the eventual independence of the United States. While, in no other field is the authority of Congress less restricted by constitutional limitations than in the field of taxation, nevertheless there are limitations that have been and that should properly be continued to be placed upon Congress in its imposition of taxes and these limitations in the past have been made effective by a construction of the taxing laws in such a manner as to make them not subject to constitutional attack or by holding them in violation of the Constitution.

President Roosevelt, in his Annual Message to Congress of January 4, 1939, voiced an almost universal sentiment when he stated:

> "It will cost us taxes and the voluntary risk of capital to attain some of the practical advantages which other forms of government have acquired.
>
> Dictatorship, however, involves costs which the American people will never pay: the cost of our spiritual values. The cost of the blessed right of being

able to say what we please. The cost of freedom of religion. The cost of seeing our capital confiscated. The cost of being cast into a concentration camp. The cost of being afraid to walk down the street with the wrong neighbor. The cost of having our children brought up not as free and dignified human beings, but as pawns molded and enslaved by a machine.

If the avoidance of these costs means taxes on my income; if avoiding these costs means taxes on my estate at death, I would bear those taxes willingly as the price of my breathing and my children breathing the free air of a free country, as the price of a living and not a dead world."

However, the Government of the United States should be able to provide all its necessary revenues without attempting to reach and tax events so far in the past, with a purported transfer tax on a transfer theretofore completely enjoyed and consummated. While the question of the justice of taxes is ordinarily for Congress to determine and not for the Courts to pass upon, the construction of the Revenue Act of 1924 as imposing tax upon the half interest in the joint tenancy property which Mrs. Jacobs acquired in 1909 for which the Petitioner contends, is an instance of injustice for which there are constitutional grounds for judicial interference.

Wherefore, the Respondent submits that the decisions of the Courts below should be affirmed.

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APPENDIX.

Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Proided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."